AMERICAN EXPRESS INTERNATIONAL BANKING CORP.

v.

TAN LOON SWAN

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 03-130-90]
2 DECEMBER 1990

CIVIL PROCEDURE: *Preliminary objection not heard by High Court - Supreme Court will not decide on objection - Receipt of letter of demand not denied - Cannot later raise issue of service of demand - Entering of appearance - Submitted to jurisdiction of local Courts - Cannot later raise issue of jurisdiction - Affidavit sworn by in-house lawyer - Knowledge of debt - Amendment of name of appellant not appealed against - Time for appeal lapsed - Evidence Act 1950, s. 45.*

REVENUE LAW: *Stamp duty - Unstamped documents - Whether absolute prohibition against admissibility - Payment of duty or penalty - Stamp Ordinance 1949, ss. 43, 47, 51, 52(1).*

The appellant is a Singapore based bank which granted facilities to a Singapore registered company, C. The facilities were secured by a guarantee given by two persons, one of whom was the respondent, and by a pledge of shares made by C in favour of the appellant, which was made pursuant to a general loan and collateral agreement. As a result of default in repayments, the appellant instituted proceedings and the Senior Assistant Registrar granted summary judgment in 1987. The respondent's appeal was allowed as the trial Judge held that the issues raised by the respondent were triable. This is the appellant's appeal.

The respondent raised the following preliminary objections:

(a) want of authority on the part of the appellant's solicitors to act on behalf of the appellant, and
(b) the local Courts did not have jurisdiction to decide this dispute, arguing that the relevant agreement was to be construed according to the laws of Singapore.

Held:

[1] Although the issue of want of authority on an application by motion or summons could be determined by the Supreme Court, in this case, as the High Court had not heard that particular application as to want of authority, which application was not before the Supreme Court, the preliminary objection should be overruled.

[2] By entering an appearance, the defendant here has clearly submitted to the jurisdiction of the Courts in this country. There is also no reason why a Court in this country where the defendant resides is not the *forum conveniens*; and even if it is necessary for a Court in this country to form an opinion upon a point of foreign law, s. 45 of the Evidence Act 1950 can be applied.

[3] Since the defendant at all material times had not denied the receipt of the letter of demand, the issue of service of the letter of demand was not a triable issue.

[4] It was clear that under s. 52(1) of the Stamp Ordinance 1949 (the Ordinance) except for certain types of instruments, prohibition against admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but is conditional on payment of a duty or a penalty, if any, under ss. 43 and 47 of that Ordinance.

[5] It is the responsibility of the Court under s. 51 of the Ordinance to impound unstamped documents, if produced, and to admit them under proviso (a) to s. 52(1) on payment of stamp duty or penalty, if any. The non-stamping of documents concerned does not provide a triable issue.

[6] As the respondent has not appealed against the order of the High Court which amended the name of the appellant, the time for appeal has lapsed. Therefore, this issue was also not a triable issue.

[7] The said JRW who swore the affidavit as to the debt incurred by the respondent was an in-house lawyer employed by the appellant and since he has affirmed the said affidavit, it was not for the Court to speculate on whether JRW did in fact have personal knowledge of the said debt. Furthermore, the said affidavit was affirmed in Singapore by JRW at the address of the registered office of the appellant.

[8] The reason why only two directors signed the guarantee was because of the circular resolution of C which passed a resolution to that effect.

[Appeal allowed; order of the SAR dated 29 March 1989 restored with variation as to the final judgment sum; order to be extracted after stamping of guarantee]

[**Bahasa Malaysia** Translation of Headnotes]

PROSEDUR SIVIL: *Bantahan awalan tidak didengar oleh Mahkamah Tinggi - Mahkamah Agung tidak akan membuat keputusan atas bantahan tersebut - Penerimaan surat tuntutan (demand) tidak dinafikan - Kemasukkan kehadiran - Menerima bidangkuasa Mahkamah tempatan - Tidak boleh kemudiannya membangkitkan soal bidangkuasa - Afidavit disumpah oleh peguam syarikat - Pengetahuan mengenai hutang - Pembetulan kepada nama perayu tidak dirayukan - Masa untuk rayuan telah luput - Akta Keterangan 1950, s. 45*

UNDANG-UNDANG HASIL: *Duti Stem - Dokumen belum distem - Sama ada larangan mutlak terhadap kebolehterimaan - Pembayaran duti atau penalti - Ordinan Stem 1949, ss. 43, 47, 51, 52(1).*

Pihak perayu, sebuah bank yang berpusat di Singapura yang telah memberikan kemudahan pinjaman kepada C, sebuah syarikat berdaftar di Singapura. Kemudahan pinjaman itu telah disokong oleh satu jaminan yang telah diberi oleh dua orang. Seorang dari mereka adalah responden, dan sandaran berbentuk saham telah dibuat oleh C kepada perayu menurut satu pinjaman am dan perjanjian kolateral. Akibat dari kemungkiran perjanjian, perayu telah mengambil prosiding dan Penolong Kanan Pendaftar (PKP) telah memberikan penghakiman terus pada tahun 1987. Rayuan responden telah dibenarkan kerana Hakim perbicaraan berpendapat bahawa isu-isu yang dibangkitkan oleh responden boleh dibicarakan. Ini adalah rayuan oleh perayu.

Responden membangkitkan bantahan awalan yang berikut:

(a) ketiadaan kuasa bagi peguam untuk mewakili perayu; dan

(b) Mahkamah tempatan tidak mempunyai bidangkuasa untuk memutuskan pertikaian ini, dan menekankan bahawa perjanjian berkenaan sepatutnya ditafsirkan menurut undang-undang Singapura.

Diputuskan:

[1] Walaupun isu ketiadaan kuasa diatas adalah satu permohonan secara usul atau saman ia boleh diputuskan oleh Mahkamah Agung, dalam kes ini, oleh kerana Mahkamah Tinggi tidak mendengar permohonan berhubung dengan ketiadaan kuasa, yang mana permohonan tidak dibuat kepada Mahkamah Agung, bantahan awalan itu patut ditolak.

[2] Kehadiran pihak defendan jelas menunjukkan yang dia telah menyerah kepada bidangkuasa Mahkamah di negara ini. Juga tiada sebab mengapa Mahkamah di negara ini dimana defendan menetap tidak boleh menjadi *forum conveniens*; tambahan pula jika perlu bagi Mahkamah dinegara ini untuk membuat keputusan atas perkara undang-undang asing s. 45 Akta Keterangan 1950 boleh dipakai.

[3] Oleh kerana defendan tidak pernah menafikan penerimaan surat tuntutan, isu mengenai penyerahan surat tuntutan bukanlah satu isu yang boleh dibicarakan.

[4] Adalah jelas dibawah s. 52(1) Ordinan Stem 1949 (Ordinan tersebut), melainkan bagi beberapa jenis suratcara, larangan terhadap kebolehterimaan satu suratcara atas alasan ia tidak distemkan bukanlah satu larangan mutlak tetapi larangan bersyarat atas pembayaran duti atau penalti jika ada, dibawah ss. 43 dan 47 Ordinan tersebut.

[5] Adalah menjadi tanggungjawab Mahkamah dibawah s. 51 Ordinan tersebut untuk mengimpunkan ('impound') dokumen yang belum distem, jika dikemukakan, dan untuk menerima dokumen itu dibawah proviso (a) kepada s. 52(1) diatas pembayaran duti atau penalti, jika ada. Alasan mengenai dokumen yang belum distem tidak boleh menjadi satu isu yang boleh dibicarakan.

[6] Oleh kerana responden tidak merayu terhadap perintah Hakim Mahkamah Tinggi yang membenarkan pembetulan kepada nama perayu, masa untuk rayuan telah luput. Oleh yang demikian isu ini juga bukanlah satu isu yang boleh dibicarakan.

[7] JRW, yang menyumpahkan afidavit mengenai hutang yang ditanggung oleh responden adalah seorang peguam syarikat yang bekerja dengan perayu dan kerana dia telah mengikrarkan afidavit tersebut, Mahkamah tidak boleh membuat spekulasi sama ada JRW telah sebenarnya mempunyai pengetahuan mengenai hutang tersebut. Tambahan pula, afidavit itu telah diikrarkan di Singapura oleh JRW di alamat pejabat berdaftar perayu.

[8] Mengikut suatu resolusi pekeliling (circular resolution) syarikat C yang ditandatangani oleh pengarahnya, hanya dua pengarah C sahaja perlu menandatangani gerenti tersebut.

[Rayuan dibenarkan; perintah PKP bertarikh 29 Mac 1989 dipulih dengan penukaran kepada jumlah penghakiman muktamad; perintah hanya boleh dikeluarkan setelah jaminan distem.]

Cases referred to:

Syawal Enterprise Sdn. Bhd. & Anor. v. Dayadiri Sdn. Bhd. [1990] 3 CLJ (Rep) 165 ***(cit)***
William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd. [1991] 1 CLJ (Rep) 492 ***(cit)***
Malayan Banking Bhd. v. Agencies Service Bureau Sdn. Bhd. & Ors. [1982] CLJ (Rep) 217 ***(foll)***
Elders Keep Ltd. (formerly known as Keep Brothers Ltd.) v. Luen Mei Plastic Industries Sdn. Bhd. & Ors. [1989] 1 CLJ (Rep) 517 ***(foll)***
Koh Siak Poo v. Perkayuan OKS Sdn. Bhd. [1989] 2 CLJ (Rep) 1 ***(cit)***
Bank Bumiputra Malaysia Bhd. v. Lorrain Esme Osman [1986] CLJ (Rep) 294 ***(cit)***

Legislation referred to:

Evidence Act 1950, s. 45
Stamp Ordinance 1949, ss. 43, 47, 51, 52(1)

For the appellant/plaintiff - K. Anantham; M/s. Skrine & Co.
For the respondent - Yaw Chun Soon; M/s. Choong Yik Son & Fiona Ghaus

JUDGMENT

Gunn Chit Tuan SCJ:

The American Express International Banking Corporation (hereinafter referred to as "the plaintiff") is a Singapore-based bank. In 1985, it granted facilities to a Singapore-registered company known as Cornwall Investments Pte. Ltd. The facilities were secured by a guarantee given by two persons including one Tan Loon Swan (hereinafter referred to as "the defendant"). The said guarantee was executed by the defendant on 8 July 1985, and contained a maximum liability clause of S$10.5 million together with interest at 12% per annum from the date of demand to the date of payment (pp. 57 and 63 of the appeal records).

The banking facilities enjoyed by Cornwall Investments Pte. Ltd., were also secured by a pledge of shares made by the company in favour of the plaintiff pursuant to the terms and conditions of a general loan and collateral agreement (pp. 54, 55 of the appeal records). On 23 December 1985, Cornwall Investments Pte. Ltd. and the defendant were notified by the plaintiff of a default by the former in complying with its repayment obligations and the need to meet a shortfall in the collateral value of the pledged shares. On the same day, the plaintiff also demanded payment of the loan amount together with accrued interest of S$293,990.67 (p. 60 of the appeal records). Because Cornwall Investments Pte. Ltd. and the defendant defaulted in complying with the demand of 23 December 1985, the plaintiff caused a letter of demand to be addressed to the defendant through its solicitors on 2 January 1986 (p. 61 of the appeal records).

On 23 February 1986, the plaintiff filed a claim against the defendant describing itself as the American Express International Banking Corporation. But on 11 September 1987, the plaintiff filed a notice correcting its name in the title to the action from American Express International Banking Corporation to American Express Bank Ltd. (see supplementary appeal records).

Pursuant to the said default on the part of the defendant, the plaintiff sold some of the pledged shares on 3 June 1986, and recovered the sum of S$1,335,050 (p. 76 of the appeal records). On 15 September 1987, the plaintiff filed an application for summary judgment in respect of its claim together with a supporting affidavit affirmed by one John Richard Williamson dated 14 September 1987 (pp. 37 to 39 of the appeal records). In that affidavit, the said John Richard Williamson stated that to his own knowledge the amount due to the plaintiff as at 31 August 1987, was S$11,167,714.47. On 29 March 1989, the Senior Assistant Registrar of the High Court at Kuala Lumpur ordered that the plaintiff be at liberty to sign final judgment in the action against the defendant for the sum of S$10,500,000 together with interest thereon at the rate of 12% per annum from 2 January 1986, to date of payment and costs of the suit of RM350. The defendant filed a notice of appeal to the Judge in chambers on 30 March 1989, and before Annuar J raised eight issues as triable issues but only three of them found favour with the learned Judge, namely:

(a) That there was no evidence that the letter of demand had been served on the defendant;

(b) That the guarantee document was not stamped and therefore not admissible;

(c) Uncertainty about the status of the plaintiff.

On 11 December 1990, Annuar J ordered that the order of the Senior Assistant Registrar dated 29 March 1989, be set aside and that the defendant be given unconditional leave to defend the action and also that the plaintiff do pay the defendant the cost of appeal.

The plaintiff, being dissatisfied with the decision of the learned Judge, filed a notice of appeal to this Court on 24 December 1990. Before us, Mr. Yaw, Counsel for the defendant, raised two preliminary objections. Firstly he stated that the defendant had applied to the High Court on 12 April 1991, to strike out the plaintiff's statement of claim on the ground that the solicitors M/s. Skrine & Co., had no authority to act on behalf of the plaintiff. The application was originally fixed for hearing on 6 June 1991, but was adjourned a couple of times until 4 July 1991, when the relevant file could not be traced in the High Court. Counsel referred to *Syawal Enterprise Sdn. Bhd. & Anor. v. Dayadiri Sdn. Bhd.* [1990] 3 CLJ (Rep) 165 and contended that a challenge to the authority of solicitors may be made at any time. Mr. Anantham, Counsel for the plaintiff, replied by pointing out that the plaintiff's suit was filed in 1986 and that judgment was obtained against the defendant in 1987 and contended that it was too late for the defendant to raise this issue in the Supreme Court in November 1991. We were informed by Counsel for the defendant that he was aware of *William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd.* [1991] 1 CLJ (Rep) 492, in which this Court held '*inter alia*' that where there is no evidence that there is no action properly before the Court, it could determine the issue of want of authority on an application by motion or summons which the defendant has in fact filed in this case. However, we considered that as the High Court has not heard that application which was not before us, this preliminary objection should be overruled.

The second preliminary objection was that the Courts in this country do not have jurisdiction because it is stated in Clause 21 of the general loan and collateral agreement that the said agreement is to be construed according to, and the rights of the parties are to be governed by, the laws of Singapore. Mr. Anantham, in reply pointed out that the appeal before us was not concerned with the general loan and collateral agreement but with the guarantee signed by the defendant in which there is no clause to specify that it was to be construed according to the laws of Singapore. We however noted that after service of the writ of summons and statement of claim on the defendant, he took no steps to apply for leave to enter conditional appearance with a view to striking out the claim on the ground that the Courts in this country have no jurisdiction. Instead the defendant, having entered appearance, filed his defence in 1986, which was amended in 1987 and re-amended in 1988 (pp. 18 to 22 of the appeal records). The defendant has clearly submitted to the jurisdiction of the Courts in this country and in any case we see no reason why a Court in this country where the defendant resides is not the *forum conveniens*, and even if it is necessary for a Court in this country to form an opinion upon a point of foreign law, s. 45 of the Evidence Act 1950, can be applied. The second preliminary objection by defendant's Counsel was therefore also overruled.

We now return to the three issues which the learned Judge considered were triable. As regards service of the letter of demand, it is true that clause 1 of the guarantee provides that there must be demand in writing made on the guarantor but it is also provided in Clause 17 of the guarantee that any notice of demand shall be deemed to have been duly given to the guarantor by sending the same by post addressed to him at the address provided in the guarantee. The letter of demand appearing on p. 61 of the appeal records was addressed to the defendant at the 20th Floor, Wisma Supreme, Jalan Punchak, Kuala Lumpur, which is the defendant's address stated in the guarantee. It is also provided in Clause 20 of the guarantee

that the defendant has waived any representation demand or other notice of any kind and there is no evidence of any denial of receipt of the letter of demand in the affidavit of reply filed by the defendant. We therefore with respect disagree with the learned Judge that this was a triable issue.

As regards stamping of the documents concerned, Mr. Yaw pointed out that the loan agreement had not been stamped in accordance with the Stamp Ordinance and was therefore not admissible to prove the loan to Cornwall Investments Pte. Ltd. He contended that if the loan is not proved, the guarantor is not liable and pointed out that the guarantee itself signed by the defendant was also not stamped. Mr. Anantham on the other hand pointed out that the issue was not raised by the defendant either in his statement of defence or in his affidavit in reply or before the Senior Assistant Registrar. As it was raised for the first time before the learned Judge in the High Court, an attempt was made to have the matter adjourned to stamp the guarantee but Counsel's request was refused by the learned Judge. It is the contention of the plaintiff that the Court can grant judgment if that was the only issue with the condition that the judgment cannot be extracted unless the stamped guarantee is produced to the Registrar of the Court and the plaintiff was prepared to undertake the stamping of the guarantee.

We were referred to and agree with the decision of the Federal Court in *Malayan Banking Bhd. v. Agencies Service Bureau Sdn. Bhd. & Ors.* [1982] CLJ (Rep) 217, 220 in which the Federal Court held that it was clear that under s. 52(1) of the Stamp Ordinance 1949, except for certain types of instruments prohibition against admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but conditional on payment of a duty or a penalty, if any, under ss. 43 and 47 of the Ordinance. We would also agree with the views of the Federal Court that is the responsibility of the Court under s. 51 of that Ordinance to impound unstamped documents, if produced, and to admit them under proviso (a) to s. 52(1) on payment of stamp duty or penalty, if any. As regards the question whether the Bar Council in this country would consider any of its members as being unprofessional for raising a stamp objection, we also agree that this is a matter left to that body to decide. The Court and Counsel appearing before it as officers of the Court are only under an obligation to draw the Court's attention to its powers under ss. 51 and 52(1) including its provisos. We therefore agreed with and approve the views of V.C. George J expressed in *Elders Keep Ltd. (Formerly known as Keep Bros. Ltd.) v. Luen Mei Plastic Industries Sdn. Bhd. & Ors.* [1989] 1 CLJ (Rep) 517, 520 that the non-stamping of documents concerned does not provide a triable issue.

As for the third issue, it has been pointed out that the name of the plaintiff has been changed on 11 July 1985, as shown in the supplementary appeal records and in any case the defendant has accepted the change of name of the plaintiff when he filed certain pleadings setting out the correct name of the plaintiff as shown in the documents exhibited in the said supplementary appeal records. The issue was only raised for the first time in the appeal before the Judge of the High Court and the plaintiff has since applied and obtained an order from a Judge of the High Court amending the name of the plaintiff to the "American Express Bank Ltd. The defendant has not appealed against that order of the Judge and the time for appeal has lapsed. We therefore agreed with Mr. Anantham that was not a triable issue.

Mr. Yaw then referred to the decision of this Court in *Koh Siak Poo v. Perkayuan OKS Sdn. Bhd. & Ors.* [1989] 2 CLJ (Rep) 1, in which this Court, in a judgment delivered by Hashim Yeop A. Sani CJ Malaya, held that the approach to be taken by an appellate Court in an

O. 14 appeal has been settled and that the appeal Court should not regard the appeal as reviewing the exercise of the Judge's discretion but should approach the appeal as a rehearing. Mr. Yaw then urged us to consider some other issues which did not find favour with the learned Judge in the High Court. We then spent some time listening to the submissions of Counsel on those issues but considered that only two of them merited consideration by us. Mr. Yaw referred us to the affidavit affirmed by the said John Richard Williamson on 14 September 1987 (pp. 37 to 39 of the appeal records) and pointed out that the person who had affirmed the affidavit has stated that he is an associate Counsel in and employed by the plaintiff. Counsel then referred to para. 4 of the affidavit affirmed by the defendant on 28 January 1988 (p. 42 of the appeal records), in which he has stated that he was:

> advised by his solicitors and verily believed that the deponents in the plaintiff's affidavits did not even disclose the sources and grounds for their beliefs in the correctness of their averments therein, thereby rendering them materially defective in substance and not merely in form and thus inadmissible as evidence for the proceedings herein.

Counsel then referred to *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman* [1986] CLJ (Rep) 294 and contended that the learned Judge had erred in accepting the affidavit of the said John Richard Williamson as the deponent being an associate Counsel in the employment of the plaintiff could not state that it was within his own knowledge that the said debt was incurred and was still due and owing. We however considered that because the said John Richard Williamson was an in-house lawyer employed by the plaintiff and has affirmed the said affidavit, it was not for the Court to speculate on whether he did in fact have personal knowledge of the said debt of the defendant. In any case, we noted that the said affidavit was affirmed in Singapore by him at G4/G5, Shing Kwan House, 4 Shenton Way, Singapore 0106, which is the address of the registered office of the plaintiff.

Counsel then referred to the letter of offer (pp. 68 to 70 of the appeal records), wherein it was stated that the guarantee form should be signed by all the five directors named therein and pointed out that the said guarantee was only signed by two of the directors. He also stated that the interest charged was higher than that indicated in the said letter of offer but there was no evidence of variation of the rate of interest. On these points, we would refer to the circular resolution of Cornwall Investments Pte. Ltd. signed by their directors (pp. 63 to 67 of the appeal records) and agree with Mr. Anantham that it was resolved that only one Tan Koon Swan and the defendant were to jointly guarantee the banking facilities made by the plaintiff to Cornwall Investments Pte. Ltd. and that explains why only two of its directors signed the guarantee after the said letter of offer. We also note that interest at 12% per annum was covered by the said resolution.

Having heard the submissions of Counsel on the appeal, we, for reasons stated, do not consider that in the particular circumstances of this case there are any triable issues. We therefore allowed the appeal with costs here and below, set aside the order of the learned Judge and restored the order of the Senior Assistant Registrar dated 29 March 1989, which was however varied by us to the effect that the final judgment to be signed against the defendant should be for the sum of S$10,500,000 together with interest thereon at the rate of 8% per annum from the date of the writ to the date of payment or its equivalent in Malaysian Ringgit on the date of payment. The order of this Court is also not to be extracted until the guarantee document has been stamped to the satisfaction of the Senior Assistant Registrar and the deposit should be refunded to the appellant.

Also found at [1992] 1 CLJ 9